

CASE NO. 89-1021

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1989 TERM

LOIS MORALES,

Petitioner,

vs.

ALBERT BURROUGHS and KANSAS
STATE UNIVERSITY,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS
IN OPPOSITION

Richard H. Seaton
University Attorney
Kansas State University
111 Anderson Hall
Manhattan, Kansas 66506
(913) 532-5730
Attorney for Respondents

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	i, ii
Statement of the Case.....	1
Summary of Argument.....	4
Reasons for Denying Writ....	6
A. ANY EMOTIONAL DISTRESS SUFFERED BY PETITIONER FOR ACTS PRIOR TO NOVEM- BER 5, 1985, WERE REASONABLY ASCERTAINABLE TO HER MORE THAN TWO YEARS PRIOR TO THE FILING OF HER LAWSUIT.....	6
B. DR. MODLIN'S AFFIDAVITS ARE IDADMISSEBLE FOR SEVERAL REASONS.....	13
C. THIS CASE PRESENTS NO CONFLICT REQUIRING SUPREME COURT REVIEW....	20
Conclusion.....	23
Certificate of Service.....	24

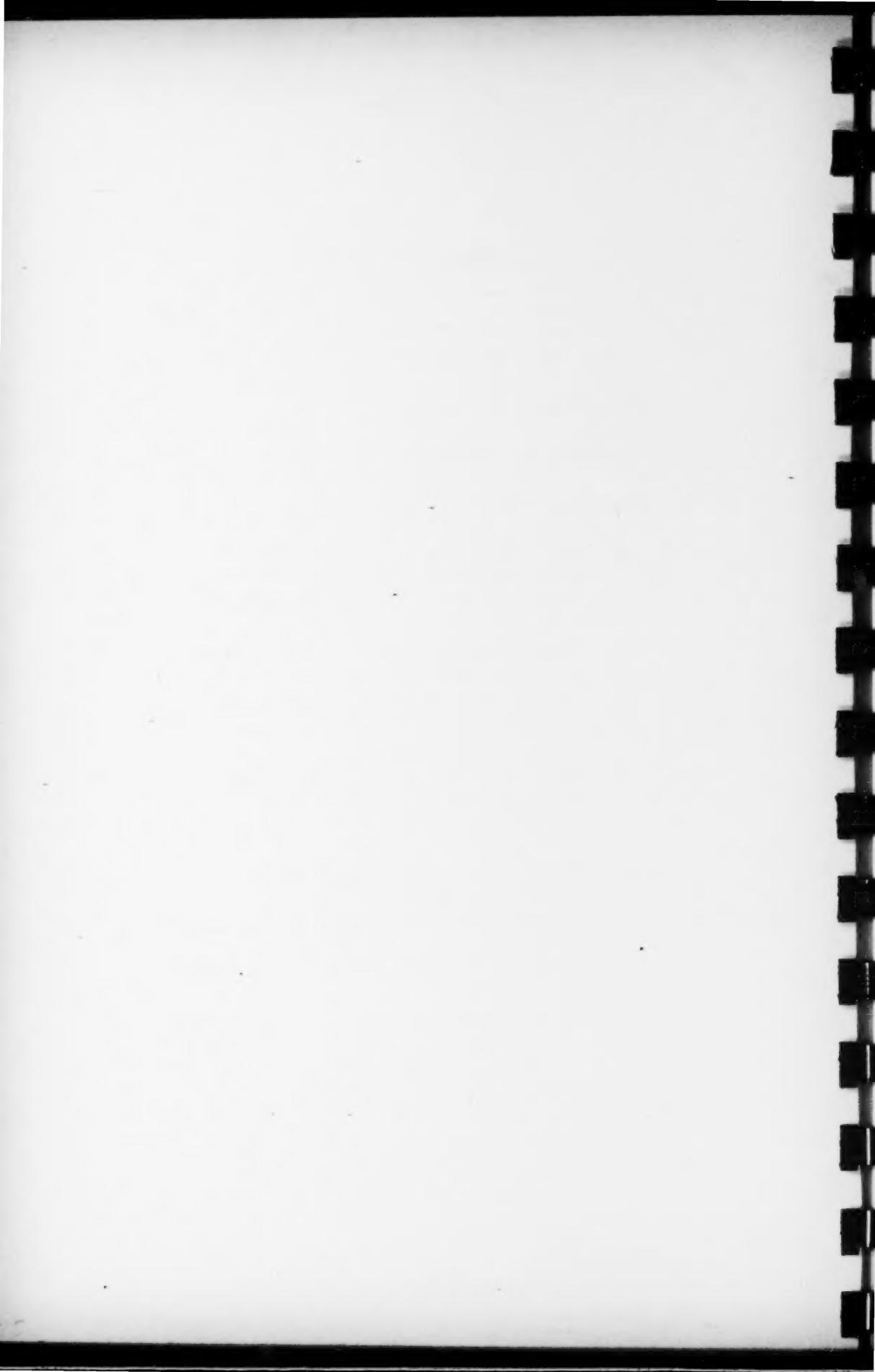


TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<u>Equal Employment Opportunity Commission, et al. v. Micro-Oil, et al., No. 87-2471-0 (D.Kan., December 27, 1988).....</u>	22
<u>Fund of Funds, Ltd. v. Arthur Andersen and Co., 545 F.Supp. 1314 (1982)....</u>	18
<u>Lollis v. Superior Sales Co., 224 Kan. 251 (1978).....</u>	14
<u>Mays v. Ciba-Geigy Corp., 233 Kan. 38 (1983).....</u>	12, 13
<u>Roberts v. Saylor, 230 Kan. 289 (1981).....</u>	9, 15
<u>Radobenko v. Automated Equip- ment Corporation, 520 F.2d 540 (9th Cir. 1975).....</u>	13
<u>Roe v. Diefendeorf, 236 Kan. 218 (1984).....</u>	10
<u>State v. Hobson, 234 Kan. 133 (1983).....</u>	17
<u>Zenith Radio Corp. v. Matsushita Electrical Co., 505 F.Supp. 1125 (1980)....</u>	14, 20

STATUTES:

K.S.A. 60-513(b).....	6, 10
K.S.A. 60-256(c).....	21
K.S.A. 60-456.....	14
Fed.R.Civ.P. 56.....	21

STATEMENT OF THE CASE

On November 5, 1987, petitioner, Lois Morales, sued a professor at Kansas State University, and the University for intentional infliction of emotional distress. Petitioner alleged that Dr. Burroughs, now an emeritus professor, sexually harassed her from 1979 to 1983.

Petitioner alleged that the following specific acts by Dr. Burroughs took place on October 22, 1979, and either a year and one-half or two years thereafter: (a) He asked her to go to bed with him; (b) he tried to hug her in the elevator; (c) he grabbed at her breasts, squeezing her nipples; and (d) he once put his foot between her legs when she was getting something out of the storage

area.

In a letter dated April 18, 1983, petitioner wrote to Dr. Burroughs claiming that her "physical and mental health" were affected by his alleged behavior towards her. In a second letter to Dr. Burroughs dated November 12, 1985, petitioner stated, "your sexual harassment of me from 1978 to 1983 caused me much mental and physical anguish...."

Petitioner consulted a psychiatrist, Dr. Herbert Modlin, on April 29 and May 1, 1986. Dr. Modlin made no diagnosis after the second examination on May 1, 1986. Dr. Modlin examined petitioner for the third time on May 18, 1987, less than six months prior to the filing of this lawsuit. At the end of that

examination he made the following diagnosis: "I pointed out that she has no serious psychiatric disorder which would explain or excuse unsatisfactory work."

In response to defendants' motions for summary judgment, plaintiff filed an affidavit impeaching the admissions contained in her letters to Dr. Burroughs by stating that she was merely trying to convey the idea that she was "upset" by his actions. Plaintiff also filed affidavits by Dr. Herbert Modlin. Those affidavits contained statements impeaching his own reports and concluding that petitioner's alleged injury was not "reasonably ascertainable" to her until he saw her in May, 1986.

The District Court of Riley County, after reviewing the discovery record, ruled that petitioner's injury and the act causing the injury were both readily ascertainable prior to November 5, 1985, and that the two year statute of limitations contained in K.S.A. 60-513 had run. The Court thus granted defendants' motions for summary judgment. This decision was affirmed by the Kansas Court of Appeals. The Kansas Supreme Court denied review.

SUMMARY OF ARGUMENT

Petitioner cannot escape summary judgment by filing affidavits by herself and a psychiatrist for purposes of impeaching her own written admissions that she recognized her

extreme emotional distress more than two years prior to the filing of this lawsuit.

Also, in this case, her psychiatrist's testimony would not be admissible because a jury can evaluate emotional distress without expert assistance and because her psychiatrist's testimony would invade the province of the jury.

Finally, this case does not represent a conflict on a federal question between the state and federal systems. Summary judgment is a fact-based determination. The existence of another decision denying summary judgment by a federal court shows merely that the two courts were applying a summary judgment rule to different sets of facts. The denial

of a trial by the application of a summary judgment rule does not create a federal due process question. Thus, a writ of certiorari should be denied.

REASONS FOR DENYING WRIT

A. ANY EMOTIONAL DISTRESS SUFFERED BY PETITIONER FOR ACTS PRIOR TO NOVEMBER 5, 1985, WERE REASONABLY ASCERTAINABLE TO HER MORE THAN TWO YEARS PRIOR TO THE FILING OF HER LAWSUIT.

K.S.A. 60-513(b) makes the following exception to the two year statute of limitations applicable in this case: The cause of action... "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of the injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not

commence until the fact of injury becomes reasonably ascertainable to the injured party...." Plaintiff invokes this exception, claiming that she had the first medical diagnosis that her problems were related to the actions of Dr. Burroughs on April 29 and May 1, 1986. However, the undisputed facts in this case must bar the plaintiff from contending successfully that the fact of her alleged injury was not "reasonably ascertainable" prior to November 5, 1985, the date two years prior to the filing of this lawsuit.

First, in her letter of April 18, 1983, to Albert Burroughs, petitioner claimed that her "physical and mental health" were affected by his alleged behavior toward her.

Again, in a letter of November 12, 1985, petitioner states to Dr. Burroughs that "your sexual harassment of me from 1978 to 1983 caused me much mental and physical anguish...." Moreover, it must be kept in mind that plaintiff is alleging the tort of outrageous conduct and claiming in paragraph 6 of her petition that Dr. Burroughs' behavior "caused plaintiff extreme emotional distress so severe that no reasonable person could be expected to endure it." Accepting petitioner's own account in her letter of April 18, 1983, the extreme acts attributed to Dr. Burroughs included asking her to go to bed with him, hugging her in the elevator, and grabbing at her breasts and squeezing her nipples. Those acts, she states,

took place during a period beginning October 1979 and extended for a year and one-half. It is inconceivable that any emotional distress from these alleged acts was not spontaneous and immediate. In Roberts v. Saylor, 230 Kan. 289, 294 (1981), the court has said that "[e]motional distress passes under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry." If, indeed, Ms. Morales experienced emotional distress as a result of Dr. Burroughs' alleged behavior, she would not need to have a psychiatrist tell her of the injury five or more years

after the behavior occurred. And indeed, as noted in her own letters, she claims to have suffered mental and physical anguish at the time of Dr. Burroughs' alleged conduct towards her. Thus, the exception to the statute of limitations for situations where the fact of injury is not reasonably ascertainable until some time after the initial act cannot be applied to these facts. This conclusion is particularly clear in the light of Roe v. Diefendeorf, 236 Kan. 218, 222 (1984). There the court interprets K.S.A. 60-513(b) to mean that "[t]he statute of limitations starts to run in a tort action at the time a negligent act causes injury if both the act and the resulting injury are reasonably ascertainable by the

injured person." Further, the court states that the statute "does not require an injured party to have knowledge of the full extent of the injury to trigger the statute of limitations." If Ms. Morales suffered any substantial injury for any acts of Dr. Burroughs committed prior to November 5, 1985, that injury was, beyond a doubt, reasonably ascertainable to her.

As noted, plaintiff does not controvert the statements made in her letters to Dr. Burroughs of April 18, 1983, and November 12, 1985. In these letters she states that her "physical and mental health" were affected and that he had caused her "much mental and physical anguish." However, in her affidavit, plaintiff attempts to

deny the clear meaning of these statements and to say that she meant to say that the behavior she alleged on the part of Dr. Burroughs merely "upset" her. The obvious purpose of the latter statement is to try to create an issue as to whether she ascertained the claimed injury more than two years before she filed this action.

The Kansas Supreme Court has said that a party may not defeat summary judgment by filing a subsequent affidavit impeaching the party's previous testimony. Mays v. Ciba-Geigy Corp., 233 Kan. 38 (1983). While plaintiff's admissions were contained in her letters and not in previous deposition testimony, the same rule should apply. These letters

have been presented previously by plaintiff for evidentiary purposes and are her uncontroverted statements. As the Court has pointed out, the "object of summary judgment is to separate real issues from those that are formal and pretended...." Mays at 43 quoting Radobenko v. Automated Equipment Corporation, 520 F.2d 540 (9th Cir. 1975). To allow plaintiff to raise an issue of fact by controverting her earlier plain statements is to undermine the very purpose of the summary judgment process.

B. DR. MODLIN'S AFFIDAVITS ARE INADMISSIBLE FOR SEVERAL REASONS.

In determining admissibility on a summary judgment motion, the same standards apply as at trial, including the standards for admissibility of

expert testimony. Zenith Radio Corp.

v. Matsushita Electrical Co., 505

F.Supp. 1125, 1139-41 (1980). In

Lollis v. Superior Sales Co., 224 Kan.

251, (1978) the Kansas Supreme Court

set out rules concerning the

admissibility of expert testimony

applicable in this case:

Under K.S.A. 60-456 the opinion testimony of experts on the ultimate issue or issues is not admissible without limitation. Such testimony is admissible only so far as the opinion will aid the jury in the interpretation of technical facts or when it will assist the jury in understanding the material in evidence. (Syl. 1)

The basis for the admission of expert testimony is necessity, arising out of the particular circumstances of the case. Where the normal experience and qualifications of laymen jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are inadmissible. (Syl. 3)

The Kansas Supreme Court has

said that "[e]motional distress passes under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry." Robert v. Saylor, 230 Kan. 289, 294 (1981). All of these mental reactions are well within the experience of every human being. The injury that may result from outrageous conduct is the kind of reaction that has been experienced over and over by any adult person. No showing of some esoteric psychological state is required, as plaintiff would have the Court believe. Moreover, it is important to recognize that it is uncontroverted that plaintiff did not

consult with Dr. Modlin until long after the events alleged to have brought about plaintiff's emotional distress. He was therefore in no better position to evaluate the plaintiff's mental reaction at the time of those events that are the subject of this lawsuit than is the Court.

In ruling on defendants' motions for summary judgment, the Court had to determine whether any emotional distress suffered by the petitioner for acts prior to November 5, 1985, was reasonably ascertainable by her. The plaintiff's expert, Dr. Modlin, in his affidavit attempts to usurp the Court's role and make that judgment. Plaintiff's factual statement quotes Dr. Modlin as

concluding that, "[t]he fact of this injury was not reasonably ascertainable by plaintiff until Dr. Modlin saw her for the second time in May, 1986." This is a legal question to be determined by the Court. The inadmissibility of such a statement is supported by State v. Hobson, 234 Kan. 133, 161 (1983). In that case, the trial court excluded proffered opinion testimony from a psychiatrist, based on his contact with the accused subsequent to the time when the crime was committed, that she could not have committed the crime because she lacked the mental capacity to do so. The court found that the facts presented by the evidence were neither technical, complicated, nor beyond the average experience and common

knowledge of the jury. The appellate court found that the proffered evidence "encroached directly upon the jury's exclusive province to determine from the evidence whether or not the appellant actually committed the crime...."

"Mere qualification as an expert is not a license to invade the jury's function by telling the jury what result to reach... (citations omitted); nor is it appropriate for an expert to supplant the judge's function to instruct the jury on the law. Fund of Funds, Ltd. v. Arthur Andersen and Company, 545 F.Supp. 1314, 1372 (1982). The reason for the inadmissibility of Dr. Modlin's opinions as set out in his affidavit are clearly explained in a fairly

recent federal case:

...opinions do not assist the jury when they are cumulative of evidence already before the jury, or when the expert has sifted through that evidence reaching a conclusion which in essence attempts to tell the jury how it should decide the case. Rather, the expert must utilize specialized knowledge, not ordinarily possessed by the laymen, to reach an opinion which truly aids the jury in understanding the evidence or in determining of fact in issue. We think one of the best expressions of this principle is contained in Stern, Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation, 20 Case Western L. Rev., 527, 546 (1969): The expert should strive to instruct the court in the ways of his work, whether it be psychology, literature or whatever, and to explain the nature of the judgments made in that work.... (emphasis added)

If...the expert opinions in this litigation stem merely from a rehash of the evidence already before the trier of fact without adding a component of expertise, i.e., his [the expert's] work, "those portions will be found inadmissible because they are the unhelpful "oath-helping" of a

"conspiracyologist." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F.Supp. 1333-34 (1980).

Dr. Modlin, in his affidavit, does nothing more than recite the statements of the plaintiff and draw conclusions of law that she suffered extreme emotional distress and that she was not able to ascertain prior to his diagnosis that she suffered extreme emotional distress. Such testimony is inadmissible in that it invades the province of the Court.

C. THIS CASE PRESENTS NO CONFLICT REQUIRING SUPREME COURT REVIEW.

Petitioner contends that there is an issue to be resolved by the Supreme Court because, in another case decided in Federal District Court, an affidavit from a psychiatrist was found to have raised a factual issue

concerning when the plaintiffs in that case had discovered their alleged injury. She contends that a conflict on a federal question has thereby been created.

A summary judgment decision under K.S.A. 60-256, like Fed. R. Civ. P. 56, is a fact-based decision. "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." K.S.A. 60-256(c). In this case, the petitioner made clear statements that she recognized her emotional distress

far more than two years before she filed her lawsuit. The District Court of Riley County did not find that her own attempts to impeach her admission or the affidavits of Dr. Modlin used for this purpose succeeded in raising a genuine issue of material fact.

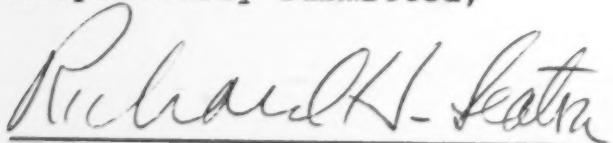
Petitioner relies on Equal Employment Opportunity Commission, et al. v. Micro-Oil, et al., No. 87-2471-0 (D.Kan., December 27, 1988). In that case the court applied the federal judgment rule to a different set of facts and denied summary judgment. There is no mention of any admissions of earlier recognition of the injury. Thus, these cases do not represent a conflict between the state and federal systems, but rather merely a difference in the facts upon which the

two courts applied a summary judgment rule. Neither court was involved in deciding a federal question. Moreover, the fact that a grant of summary judgment precludes a trial creates neither a conflict nor a federal due process question, as petitioner contends.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

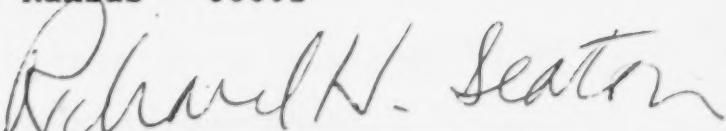


Richard H. Seaton
University Attorney
Kansas State University
111 Anderson Hall
Manhattan, Kansas 66506
(913) 532-5730

CERTIFICATE OF SERVICE

I, Richard H. Seaton, hereby certify that I served copies of the foregoing Brief of Respondents In Opposition, by depositing the same in the United States mail, postage prepaid, this 26~~th~~ day of January, 1990, addressed to:

William E. Metcalf
Jo Lynne Justus
METCALF AND JUSTUS
3601 S.W. 29th, Suite 207
P.O. Box 2184
Topeka, Kansas 66601


Richard H. Seaton